IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1385 of 1993

with

CRIMINAL APPEAL No 248 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHANKER KAVAJI NINAMA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1385 of 1993
   MR NITIN M AMIN for the appellants
   Mr.H.L. Jani, APP for Respondent No. 1
2. Criminal Appeal No. 248 of 1994
   Mr. H.L. Jani, APP for Petitioner No. 1
   Mr. Nitin M. Amin for the respondents

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 18/10/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellants Nos. 1 and 2, original accused Nos. 13 and 5 respectively, by filing Criminal Appeal No.1385 of 1993, have questioned the legality and validity of the judgment and order dated October 22, 1993, passed by the learned Additional Sessions Judge, Sabarkantha, at Himatnagar, in Sessions Case No.24 of 1993, by which judgment and order, appellant No.1, Shanker Kavaji Ninama, (original accused No.13), was convicted under Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life, whereas appellant No.2, Manaji Jivaji Ninama, (original accused No.5), was convicted under Section 324 of the Indian Penal Code and sentenced to undergo simple imprisonment for ten months. Both the appellants were convicted under Section 135 of the Bombay Police Act and fine of Rs.100 was imposed on both the appellants, in default S.I. for 7 days.

2. The State of Gujarat has filed Criminal Appeal No.248 of 1994 under Section 378 of the Code of Criminal Procedure ('Code' for short) challenging the same judgment and order, whereby, the learned Additional Sessions Judge had acquitted accused Nos. 1 to 4 and 6 to 12 of the offences under Sections 302 147, 148, 149, 307, 337, 504 read with Section 34 of the Indian Penal Code and Section 135 of the Bombay Police Act.

3. Briefly stated, the prosecution case is as under:
On October 26, 1992, around 12.30 hrs, P.W.1, Virjibhai Vajaji Ninama, who was residing at village Gadi, Taluka Vijaynagar, District Sabarkantha, along with his uncle Harji Rupabhai (since deceased), P.W.3, Vasantbhai Harjibhai, P.W.2, Chunilal Becharbhai, Bajaji Gamaji (not examined) and P.W.4, Vanraj Damaji, had come to the place of the complainant to greet him on the eve of the New Year's day. At that time, the accused persons, who had formed unlawful assembly with the common object to commit murder of deceased Harji Rupabhai and to cause injuries to other persons who had gathered there, came raising shouts and abusing. P.W.1, Virjibhai Vajaji Ninama, had

requested the accused persons not to use abusive language. According to the say of P.W.1, Virjibhai Vajaji Ninama, the members of the unlawful assembly were armed with sticks and stones and were pelting stones at the house of P.W.1, Virjibhai Vajaji Ninama. When P.W.1, Virjibhai Vajaji Ninama, had again requested them not to use abusive language, all the members of the unlawful assembly had got excited and uttered the words that they wanted to finish all the persons who had gathered at the house of P.W.1, Virjibhai Vajaji Ninama. Accused no.1, Shanker Kavaji Ninama, assaulted deceased Harji Rupabhai and inflicted a knife blow on the left portion of his chest. As per the say of P.W.1, Virjibhai Vajaji Ninama, accused no.5, Manji Jivaji Ninama, had inflicted a knife blow on the head of P.W.3, Vasantbhai Harjibhai. As per the say of P.W.1, Virjibhai Vajaji Ninama, accused No.3, Basvantsing Kalaji Ninama, had inflicted a blow with a stick to P.W.4, Vanraj Damaji. Harji Rupabhai, due to infliction of knife blow on his chest, had become unconscious and he was brought in the house. The accused persons had run away after causing injuries to Harji Rupabhai, P.W.3 Vasantbhai Harjibhai and P.W.4 Vanraj Damaji. A jeep was called to take Harji Rupabhai to the Hospital for medical treatment, and Harji Rupabhai was shifted to the Vijaynagar Government Hospital, where he was examined by the Doctor on duty and he was declared dead. Injured P.W.3 Vasantbhai Harjibhai and P.W.4 Vanraj Damaji were treated in the Hospital at Vijaynagar. After providing medical treatment to the injured persons, P.W.1, Virjibhai Vajaji Ninama, went to the Vijaynagar Police Station to lodge his complaint. P.W.1, Virjibhai Vajaji Ninama, lodged his complaint around 16.15 hrs which was recorded by P.W.10, Police Head Constable, Joravarsinh Hamirsinh, who was at the relevant time discharging his duties as Police Station Officer at Vijaynagar Police Station. The complaint was registered at C.R. No.I-106/92. P.W.10, Police Head Constable, Joravarsinh Hamirsinh, went to Vijaynagar Government Hospital and held inquest of the body of Harji Rupabhai and, thereafter, sent the dead body for post-mortem to the Medical Officer of the same Hospital. P.W.6, Dr. D.K. Parmar, at Vijaynagar Community Health Center, performed post-mortem of the dead body of Harji Rupabhai between 5.35 p.m. and 7.20 p.m. The investigation of the above crime was handed over to P.W.14, PSI, B.G. Waghela. P.W.14, PSI, B.G. Waghela, had recorded statements of Chunilal Becharji and Padalji Ramaji on October 27, 1992. P.W.14, PSI, B.G. Waghela, had drawn the panchanama of the place of the incident and had also drawn the panchanama of the physical condition of injured P.W.3 Vasantbhai Harjibhai, and had collected clothes put

on by the injured at the time of the incident. P.W.14, PSI, B.G. Waghela, had also collected the incriminating articles from the place of the incident. On the same day, P.W.14, PSI, B.G. Waghela, had also recorded statements of Vasant Harji, Vanraj Damaji, Pathiben Vasantbhai, Shakriben Damaji, Balubhai Kanjibhai, Meeraben Jeshubhai and Jiviben Harjibhai. On the same day, five accused persons were arrested under an arrest panchanama. On the same day, the house of the accused No.1 was also searched but no incriminating article was found from the said house. On October 28, 1992, accused No.5, Manji Jivaji Ninama, while he was in custody, had shown his willingness to produce the knife which he had used in commission of crime and, accordingly, two panchas were called and a preliminary panchanama was drawn at the Police Station. The panchas, police personnel, and accused No.5, Manji Jivaji Ninama, had gone in a police vehicle to the place as shown by the accused No.5 from which place the muddamal knife was recovered under a panchanama prepared under Section 27 of the Indian Evidence Act. Similarly, accused No.13, Shanker Kavaji Ninama, produced a stick which was also recovered under a panchanama prepared under Section 27 of the Indian Evidence Act. On November 13, 1992, the accused No.13, while he was in custody, had shown his willingness to show the place where he had concealed the muddamal knife with which he had inflicted the knife blow on the chest of Harji Rupabhai. Accordingly, two panchas were called and, after drawing a preliminary panchanama at the Police Station, the members of the police personnel accompanied by two panchas and the accused No.13 had gone to the place as shown by the accused No.13 and from that place the muddamal knife was recovered by drawing a panchanama prepared under Section 27 of the Indian Evidence Act. P.W.14, PSI, B.G. Waghela, had sent the incriminating articles to the Forensic Science Laboratory for analysis. P.W.14, PSI, B.G. Waghela, had collected the injury certificates and post-mortem notes from Vijaynagar Community Health Center. The report of the FSL was received by P.W.14, PSI, B.G. Waghela, which was kept on the record of the above crime register. Due to transfer of P.W.14, PSI, B.G. Waghela, the investigation was handed over to PSI, Panchal, on December 25, 1992. On completion of the investigation, PSI, Panchal, had filed chargesheet against the accused Nos. 1 to 13 in the Court of the learned Judicial Magistrate, First Class, Idar, for the offences punishable under Sections 302, 307, 337, 504 read with Sections 147, 148 and 149 of the Indian Penal Code and under Section 135 of the Bombay Police Act. The said chargesheet was registered as Criminal Case No. 8 of 1993. As the offence under

Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions Judge, the learned Judicial Magistrate, First Class, committed the case to the Court of Sessions, Sabarkantha, at Himmatnagar, where it came to be numbered as Sessions Case No.24 of 1993.

4. Charge Exh.3 was framed against the accused Nos. 1 to 13 for the offences under Sections 302 147, 148, 149, 307, 337, 504 read with Section 34 of the Indian Penal Code and Section 135 of the Bombay Police Act. A specific charge was framed against the appellant No.1 for causing the murder of Harji Rupabhai, which was punishable under Sections 302 of the Indian Penal Code. The charge was read over and explained to all the accused wherein they pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charges framed against the accused persons, examined (1) PW.1, Virjibhai Vajaji Ninama, Exh.19; (2) PW.2, Chunilal Becharji, Exh.21; (3) PW.3, Vasantbhai Harjibhai, Exh.22; (4) PW. 4, Vanraj Damaji, Exh.23; (5) PW 5, Shakriben Damaji, Exh.24; (6) PW 6, Dr. D.K. Parmar, of Vijaynagar Community Health Center, Exh.27, (7) PW 7, Panch, Madhuji Virji, Exh.40; (8) PW 8, Panch, Madansinh Satansinh, Exh.45; (9) P.W.9, Damaji Valaji, Exh.68; (10) PW 10, Police Head Constable, Joravarsinh Hamirsinh, Exh.69; (11) PW 11, Police Head Constable, Kacharabhai Alkhabhai, Exh.76; (12) PW 12, Police Head Constable, Maljibhai Sankabhai, Exh.78, (13) PW 13, First Grade Jamadar, Sanjaji Narvaji, Exh.81; and (14) PW 14, IO, PSI, B.G. Waghela, Ex.85. The prosecution produced documentary evidence such as First Information Report, Exh.20, complaint of Shakriben, Exh.25, post-mortem notes, Exh.29, injury certificate of Vasant Harji Exh.31, injury certificate of Vanraj Damaji Exh.35, inquest panchanama Exh.64, panchanama of place of incident Exh.44, discovery panchanama of muddamal articles from various accused Exh.48, 49, 52, 53, 55, 56, 59, map of scene of offence Exh.71, report of the FSL Exh.66, etc. During cross examination of P.W.6, Dr. Parmar, the injury certificates of appellants Nos. 1 and 2 were produced which were admitted in evidence at Exh.37 and Exh.39 respectively. After the evidence of the prosecution was over, all the accused persons were questioned generally and their statements came to be recorded under Section 313 of the Code. The defence of the accused persons was of general denial. In the course of recording of further statements, a joint written statement was filed by all the accused persons, which was admitted in evidence at Exh.92.

5. The learned Additional Sessions Judge, on

appreciation of oral as well as documentary evidence and the arguments advanced by the learned advocates for the parties, and also the written arguments submitted by the learned advocates for the accused persons, Exh.95, held that deceased Harji Rupabhai died homicidal death; that the prosecution had proved beyond doubt that the appellant No.1 had committed the murder of deceased Harji Rupabhai which was punishable under Section 302 of the Indian Penal Code; that the appellant No.2, original accused No.5, had caused injuries on the person of PW 3, Vasant Harji; and that the appellants Nos. 1 and 2 had committed offence under Section 135 of the Bombay Police Act as both were armed with knives which were prohibited articles as per the notification issued under Section 37(1) of the Bombay Police Act. The learned Additional Sessions Judge has also held that no evidence was produced by the prosecution with regard to accused Nos. 1 to 4 and 6 to 12 for the offence for which they were charged and, accordingly, the learned Additional Sessions Judge acquitted accused Nos. 1 to 4 and 6 to 12 from the charges framed against them. The learned Additional Sessions Judge convicted the original accused No.5 for the offence under Section 324 of the Indian Penal Code and sentenced him to undergo simple imprisonment for ten months. The learned Additional Sessions Judge convicted the original accused No.13 for the offence under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life. Both the appellants have been convicted under Section 135 of the Bombay Police Act and imposed a fine of Rs.100 each in default S.I. for 7 days. The appellants Nos. 1 and 2 have filed Criminal Appeal No.1385 of 1993 challenging their conviction and sentence, as stated hereinabove.

6. Criminal Appeal No.248 of 1994 is filed by the State of Gujarat challenging the acquittal of the original accused nos. 1 to 4 and 6 to 12 recorded by the learned Additional Sessions Judge.

7. As common question of facts and law arises for our consideration, we propose to dispose of both the appeals by this common judgment and order.

8. Learned advocate Mr. Nitin M. Amin for the appellants and learned Additional Public Prosecution, Mr. H.L. Jani, have taken us through the entire record and proceedings of the case.

9. We have heard learned counsel for the parties and have also gone through the judgment of the learned Additional Sessions Judge.

10. Learned advocate, Mr. Nitin Amin, for the appellants, with his usual fairness, has frankly conceded that, in the state of evidence, it is not possible for him to press the case of the appellant No.1. Learned advocate, Mr. Nitin Amin, has submitted that, in the facts and situation of the case, and the manner in which the incident had taken place, the appellant No.1 could not have been convicted for the offence under Section 302 of the Indian Penal Code, but he should have been convicted for the offence under Section 304 Part II of the Indian Penal Code. Learned advocate, Mr. Nitin Amin, has submitted that the day of the incident was a 'New Year' day when all the village people were greeting each other and were visiting each others' place. That, the incident in question had taken place due to sudden fight between the two groups, wherein, the appellant No.1 had inflicted only one blow with the knife on the chest of the deceased Harji Rupabhai and, therefore, at the best it can be said that he had knowledge that he was likely to cause death. Learned advocate, Mr. Nitin Amin, has submitted that there was no intention on the part of the appellant No.1 to cause death of deceased Harji Rupabhai. Learned advocate, Mr. Nitin Amin, has further submitted that the offence committed by the appellant No.1 would fall under Part II of Section 304 of the Indian Penal Code and, therefore, the appeal be allowed partly by reducing the sentence. With regard to the appellant No.2, learned advocate, Mr. Nitin Amin, has submitted that the appellant No.2 was convicted under Section 324 of the Indian Penal Code and had remained in custody for nearly one year, and, therefore, suitable orders be passed.

11. Learned APP, Mr. H.L. Jani, has vehemently submitted that there is no error in the judgment and order of the learned Additional Sessions Judge so far as the convictions and sentences of the appellants are concerned and, therefore, the Criminal Appeal No.1385 of 1993 filed by the appellants be dismissed. Arguing the Criminal Appeal no.248 of 1994, the learned APP has submitted that the prosecution had led sufficient evidence to come to the conclusion that the original accused persons had formed unlawful assembly armed with deadly weapons to cause the murder of deceased Harji Rupabhai and to cause injuries to the persons who had gathered at the place of P.W.1, Virjibhai Vajaji Ninama. Learned APP, Mr. H.L. Jani, has further submitted that the Criminal Appeal No.248 of 1994 filed by the State be allowed and the original accused Nos. 1 to 4 and 6 to 12

be held guilty under Sections 147, 148, 149, 302 and 307 of the Indian Penal Code.

12. We have carefully scanned through the oral as well as documentary evidence. We are of the view that the prosecution had proved that the appellant No.1 had caused death of deceased Harji Rupabhai, but, looking to the manner in which the single blow was inflicted on the deceased, the offence committed by the appellant No.1 would fall under Part II of Section 304 of the Indian Penal Code, and not under Section 302 of the Indian Penal Code. There was a sudden quarrel where in a heat of passion, the appellant No.1 had inflicted the single knife blow on deceased Harji Rupabhai which unfortunately landed on the left portion of the chest. The appellant No.1 had never intended to cause death of deceased Harji Rupabhai. In view of the above facts and circumstances, the conviction of appellant No.1, Shanker Kavaji Ninama, (original accused No.13), under Section 302 of the Indian Penal Code and the sentence imposed on him to undergo imprisonment for life recorded by the learned Additional Sessions Judge, Sabarkantha, at Himatnagar, in Sessions Case No.24 of 1993, are quashed and set aside, and, instead, we convict appellant No.1, Shanker Kavaji Ninama, (original accused No.13), under Section 304 Part II of the Indian Penal Code and sentence him to the period already undergone. However, the conviction of appellant No.2, Manaji Jivaji Ninama, (original accused No.5), under Section 324 of the Indian Penal Code and the sentence imposed on him to undergo simple imprisonment for ten months recorded by the learned Additional Sessions Judge, Sabarkantha, at Himatnagar, in Sessions Case No.24 of 1993, are hereby confirmed. Conviction and sentence under Section 135 of the Bombay Police Act against both the appellants are confirmed.

Criminal Appeal No.248 of 1994

13. This is an acquittal appeal in which the court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to interfere with the order of acquittal more particularly when the evidence has not inspired confidence of the learned Additional Sessions Judge who had an advantage of observing demeanour of witness. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Additional Sessions Judge for acquitting the accused Nos. 1 to 4 and 6 to 12. Suffice it to say that the learned

Additional Sessions Judge has given cogent and convincing reasons for acquitting the accused Nos. 1 to 4 and 6 to 12 and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Additional Sessions Judge in order to convince us to take the view contrary to the one already taken by the learned Judge. Therefore, the acquittal appeal deserves to be rejected.

14 As a result of foregoing reasons, Criminal Appeal No.1385 of 1993 is partly allowed. The conviction of appellant No.1, Shanker Kavaji Ninama, (original accused No.13), under Section 302 of the Indian Penal Code and the sentence imposed on him to undergo imprisonment for life recorded by the learned Additional Sessions Judge, Sabarkantha, at Himatnagar, in Sessions Case No.24 of 1993, are quashed and set aside, and, instead, we convict appellant No.1, Shanker Kavaji Ninama, (original accused No.13), under Section 304 Part 2 of the Indian Penal Code and sentence him to the period already undergone. Appellant No.1, Shanker Kavaji Ninama, (original accused No.13), be set at liberty forthwith, if his presence is not required in connection with any other case. The conviction of appellant No.2, Manaji Jivaji Ninama, (original accused No.5), under Section 324 of the Indian Penal Code and the sentence imposed on him to undergo simple imprisonment for ten months recorded by the learned Additional Sessions Judge, Sabarkantha, at Himatnagar, in Sessions Case No.24 of 1993, are hereby confirmed. Conviction and sentence under Section 135 of the Bombay Police Act against both the appellants are confirmed. The appellant Nos.1 and 2 had already paid fine of Rs.100 each as noted in the record and proceedings of the case.

Criminal Appeal No.248 of 1994 filed by the State of Gujarat is dismissed.

The muddamal be destroyed in terms of the directions given by the learned Additional Sessions Judge in the impugned judgment and order.

October 18, 2002 (M.H. Kadri, J.)

(H.H. Mehta, J.)

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